SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
2019 - 2020 Regular

Bill No:	SB 1220	**Hearing Date:**	May 27, 2020
Author:	Umberg		
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Urgency:	No	**Fiscal:**	Yes
Consultant:	GC		

Subject: ***Peace and Custodial Officers***

HISTORY

Source: California District Attorneys Association
Ventura County District Attorney Gregory D. Totten

Prior Legislation: SB 1421 (Skinner), Ch. 988, Stats. of 2018

Support: Alameda County District Attorney; Amador County District Attorney; Colusa County District Attorney; El Dorado County District Attorney; Escalante County District Attorney; Fresno County District Attorney; Humboldt County District Attorney; Lake County District Attorney; Los Angeles County District Attorney; Madera County District Attorney; Monterey County District Attorney; San Diego County District Attorney; San Francisco District Attorney; San Mateo County District Attorney; Santa Barbara County District Attorney; Santa Clara County District Attorney; Shasta County District Attorney; Siskiyou County District Attorney; Sonoma County District Attorney; Stanislaus County District Attorney; Sutter County District Attorney; Trinity County District Attorney; Yolo County District Attorney; Yuba County District Attorney

Opposition: American Civil Liberties Union of California; Association for Los Angeles Deputy Sheriffs; California Association of Highway Patrol; California Attorneys for Criminal Justice; California Public Defenders Association; California Statewide Law Enforcement; Los Angeles Police Protective League; Peace Officers Research Association of California (PORAC); Riverside Sheriffs' Association; San Francisco Police Officers Association; San Francisco Public Defenders

PURPOSE

The purpose of this bill is to 1) require law enforcement agencies to provide prosecutors a list of officer names and badge numbers who have had sustained findings of specified

misconduct, certain criminal offenses, or are facing criminal prosecution; and 2) requires that the prosecutors notify the officer that they are being placed on the list, as specified.

Existing law provides that in any case in which discovery or disclosure is sought of peace or custodial officer personnel records or records or information from those records, the party seeking the discovery or disclosure shall file a written motion with the appropriate court or administrative body upon written notice to the governmental agency which has custody and control of the records. Upon receipt of the notice the governmental agency served shall immediately notify the individual whose records are sought. (Evid. Code § 1043, subd. (a).)

Existing law provides that a motion for discovery or disclosure of personnel records shall include all of the following:

- Identification of the proceeding in which discovery or disclosure is sought, the party seeking discovery or disclosure, the peace or custodial officer whose records are sought, the governmental agency which has custody and control of the records, and the time and place at which the motion for discovery or disclosure shall be heard.
- A description of the type of records or information sought.
- Affidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records. (Evid. Code § 1043, subd. (b).)

Existing law states that courts shall, in any case or proceeding permitting the disclosure or discovery of any peace or custodial officer records requested, order that the records disclosed or discovered may not be used for any purpose other than a court proceeding pursuant to applicable law. (Evid. Code *§ 1045.)*

Existing law states that except as specified the personnel records of peace officers and custodial officers and records maintained by any state or local agency, or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except though specified litigation discovery processes. This section shall not apply to investigations or proceedings concerning the conduct of peace officers or custodial officers, or an agency or department that employs those officers, conducted by a grand jury, a district attorney's office, or the Attorney General's office. (Pen. Code § 832.7, subd. (a).)

Existing law provides that the following peace officer or custodial records maintained by their agencies shall not be confidential and shall be made available for public inspection pursuant to the Public Records Act: (Pen. Code § 832.7, subd. (b).)

- A record relating to the report, investigation, or findings of any of the following:
    - An incident involving the discharge of a firearm at a person by a peace officer or custodial officer.
    - An incident in which the use of force by a peace officer or custodial officer against a person resulted in death, or in great bodily injury.

- Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency that a peace officer or custodial officer engaged

in sexual assault involving a member of the public.

- Any record relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency of dishonesty by a peace officer or custodial officer directly relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer, including, but not limited to, any sustained finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence.

This bill requires any law enforcement agencies to, upon request, provide prosecutors a list of names and badge numbers of officers employed by the agency in the 5 years preceding the request who meet specified criteria, including, that the officer has:

- Sustained findings that they engaged in sexual assault involving a member of the public.
- Sustained findings that they engaged in an act of dishonesty related to the reporting, investigation, or prosecution of a crime; including but not limited to a sustained finding of perjury, false statements, filing false reports, destruction, falsifying or concealing of evidence.
- Sustained findings for conduct of moral turpitude.
- Sustained findings for bias against a protected class.
- A conviction of a crime of moral turpitude.
- Is currently facing criminal charges.
- That the officer is on probation for a criminal offense.

This bill requires the prosecuting agency to keep this list confidential, except as constitutionally required through the criminal discovery process under *Brady v. Maryland* (1963) 373 U.S. 83.

This bill requires a prosecuting agency, when placing an officer's name on a Brady list, to notify the officer as soon as practicable and provide the officer an opportunity to request the prosecuting agency remove the officer from the list. The decision to place or retain a peace officer's name on a Brady list shall be within the sound discretion of the prosecuting agency.

COMMENTS

1. Need for This Bill

According to the author:

> Under *Brady v Maryland*, the prosecution has a constitutional obligation not only to disclose what is already known to prosecutors, but also to learn of any such information that is known to law enforcement, including matters related to witness credibility, even that of peace officers, and make that information available to the defense.
>
> Although *Brady* and subsequent decisions have been place for many decades, some law enforcement agencies are not able to fully observe its requirements through organizational policy or practice because of the lack of clarity and the confusing patchwork of varied policies across prosecutorial jurisdictions. *Brady* does not provide a bright-line rule on the types of information that must be

revealed and departments can have difficulty establishing protocols on compiling *Brady* materials from records that may be spread throughout a department.

SB 1220 aims to strike a delicate balance between prosecutors' constitutional obligations and due process protections for peace officers. Firstly, this bill requires law enforcement agencies maintaining personnel records of peace officers to provide prosecuting agencies a list of names and badge numbers of officers employed by the agency in the five years preceding the request who meet specified criteria in accordance with the *Brady* case and subsequent decisions. Prosecuting agencies will be required to keep this list confidential, except as constitutionally required. Secondly, SB 1220 establishes California's first-ever minimum due process standards for officers by requiring prosecuting agencies, when placing an officer's name on a *Brady* list, to notify the officer as soon as practicable and provide the officer an opportunity to request the prosecuting agency remove the officer from the list.

2. Exculpatory Evidence – Brady Lists in California

Brady v. Maryland, (1963) 373 US 83 was a United States Supreme Court case that established the rule that prosecutors must turn over all evidence that may exonerate a defendant to the defense. The case has become a basic and fundamental tenet of criminal law and due process. Additionally, nationally prosecutors are held to the ethical standards set forth in *Brady*. The role of the prosecutor should not be to win his or her case, the role of the prosecutor should be to achieve justice. Part of achieving justice is making sure that the defendant has all of the state's evidence that could be used to exculpate them from a finding of guilt.

Pitchess v. Superior Court

The *Brady* decision has been applied to information regarding law enforcement officers and records related to their credibility and employment history. The landmark case in California applying the rule to law enforcement records is *Pitchess v. Superior Court*, (1974) 11 Cal.3d 531. In *Pitchess* the defendant was accused of four counts of assaulting four Los Angeles County Sheriff's deputies. However, after the alleged assault the defendant ended up in intensive care and the officers suffered no serious injuries.

Attorneys for the defendant sought records from the sheriff's office regarding complaints by the public about the specific officers who were alleged victims of the defendant, and their propensity to use excessive force on the job. The court issued a subpoena for the records, and the sheriff's office refused to comply. The Court of Appeal ruled that the subpoena should be upheld, but the agency only had to release records of sustained misconduct and the conduct must be substantiated by the agency. The California Supreme Court then unanimously agreed with the lower court.

The Pitchess procedure has been codified into California law as California Evidence Code sections 1043 and 1047.

Assn. for LA Deputy Sheriffs v. Superior Court

In August of 2019 the California Supreme Court unanimously held that law enforcement agencies could share with prosecutors the names of officers on a *Brady* list, in very limited cases,

without seeing a court order after the filing of a motion under the *Pitchess* code sections. *Association for Los Angeles Deputy Sheriffs v. Superior Court*, (2019) Case No. S243855.

The ruling permitted disclosure of specified "*Brady* alerts" in lieu of the full list. This bill would expand the ability of law enforcement agencies to share more information with prosecutors.

The ruling held that a law enforcement agency does not violate *Pitchess* "by sharing with prosecutors the fact that an officer, who is a potential witness in a pending criminal prosecution, may have relevant exonerating or impeaching material in that officer's confidential personnel file."

The ruling also explained an example of what constitutes a "*Brady* List" in California. In this case the law enforcement agency conducted a review of approximately 7,899 deputy sheriffs. They sent letters to roughly 300 of those deputies informing them that a review of their personnel records had identified potential exculpatory or impeachment information in their personnel file. Examples of "performance deficiencies" in this case included, but were not limited to:

- Immoral conduct;
- Bribes, rewards, loans, gifts, and favors;
- Misappropriation of property;
- Tampering with evidence;
- False statements;
- Failure to make statements and/or making false statements during departmental internal investigations;
- Obstruction of an investigation;
- Influencing a witness;
- False information in records;
- Violating a policy of equality – discriminatory harassment;
- Unreasonable force; and
- Family violence.

The letter further advised deputies that in order to comply with constitutional obligations the agency had to provide the names of the employees with potential exculpatory or impeachment material in their personnel file to prosecutors. Officers were given the right to object to their inclusion on the *Brady* to correct such things as clerical errors, or incorrect inclusion.

The Association for Los Angeles County Deputy Sheriffs (ALADS) opposed the proposed policy and filed a lawsuit to prohibit the LA Sheriff from disclosing the names of the deputies on the list to anyone outside of the agency without compliance with the *Pitchess* process. The trial court issued a preliminary injunction on the release of the names to prosecutors with the exception of officers that were witnesses in pending criminal prosecutions. The Court of Appeal approved of the injunction, and held that even the exception imposed by the trial court was inappropriate and prosecutors should have to comply with the full *Pitchess* process.

The California Supreme Court reversed the decision by the Court of Appeal and held that the language of the *Pitchess* statutes authorized the law enforcement agency to share *Brady* information with prosecutors for particular cases. In balancing the Brady and Pitchess cases, the Supreme Court felt that the law must be construed to allow the agency to share with prosecutors

an alert that an officer was on a Brady list. This would not violate officer confidentiality. The court examined the Legislature's actions in passing SB 1421 (Skinner), Ch. 988, stats. of 2018.

The court found that even though the Legislature made sustained findings of sexual assault, sustained findings of dishonesty, and specified allegations of use of force not confidential and subject to disclosure under the Public Records Act there are other types of police officer personnel records that could cause an officer's name to be included on a *Brady* list. The Supreme Court concluded that viewing the *Pitchess* statutes against the larger background of the prosecution's constitutional obligations under *Brady*, the law enforcement agency may provide prosecutors with *Brady* alerts, not full *Brady* lists, without violating confidentiality.

3. The Purpose of This Bill is to Codify a Procedure to Follow the Supreme Court's Decision in the Association for Los Angeles Deputy Sheriffs v. Superior Court (ALADS) That Will Ease Compliance With the Policy Set Forth by the Supreme Court

Given the ruling by the California Supreme Court in *Assn. for LA Deputy Sheriffs v. Superior Court* which stated that only specified *Brady* alerts could be disclosed to prosecutors, not full lists, this bill seeks to amend the confidentiality and disclosure provisions of the *Pitchess* sections in the Evidence Code and the confidentiality section of the Penal Code to permit disclosure of officer names and badge numbers on a *Brady* list.

Just as the Legislature codified the Supreme Court's Ruling in *Pitchess v. Superior Court*, this bill seeks to codify the Supreme Court's ruling in the *ALADS* case. By codifying the decision, the Legislature will encourage compliance and cut down on litigation in and around non-compliance.

Narrowly Tailored

This bill takes a narrowly tailored approach to codifying the Supreme Court's decision. Opponents to the legislation fall into two camps. Law enforcement groups believe that the bill is too broad and the notice provisions given to officers are insufficient. Civil liberties and defense bar groups believe that the proactive disclosure requirements aren't broad enough and the officers should not be notified at all that they are going on a *Brady* list.

The Scope of Disclosure

Opponents to this legislation argue that the bill is both too broad and too narrow in what it requires law enforcement agencies to turn over to prosecutors. Civil liberties groups would like to mandate disclosure of more information, while law enforcement advocates feel that the list is too broad. It is important to realize however, that this bill is only codifying proceedings that are in furtherance of the *Brady* decision and its progeny. Even if the California State Legislature wanted to legislate away *Brady* obligations, the Legislature would be unable to. Prosecutors and defense attorneys can still continue to enforce the *Brady* decision and its progeny as they already do, through the court process.

The scope of disclosure in this bill would be the following. It would include officers who did the following:

- Sustained findings that they engaged in sexual assault involving a member of the public.

- Sustained findings that they engaged in an act of dishonesty related to the reporting, investigation, or prosecution of a crime; including but not limited to a sustained finding of perjury, false statements, filing false reports, destruction, falsifying or concealing of evidence.
- Sustained findings for conduct of moral turpitude.
- Sustained findings for bias against a protected class.
- A conviction of a crime of moral turpitude.
- Is currently facing criminal charges.
- That the officer is on probation for a criminal offense.

The Notice Provisions are Equivalent to the Notice Provisions in the ALADS Decision

Additionally, the officers are given a limited ability to object to their inclusion on the Brady list. Specifically, the bill requires a prosecuting agency, when placing an officer's name on a Brady list, to notify the officer as soon as practicable and provide the officer an opportunity to request the prosecuting agency remove the officer from the list. The decision to place or retain a peace officer's name on a Brady list shall be within the sound discretion of the prosecuting agency.

Removal of Ambiguity that Results in Unnecessary Litigation

Since the ALADS decision reports have come in from around that state of varying compliance with the Supreme Court's ruling. The author and the proponents hope that by codifying the Court's decision with baseline and narrow guidelines, the decision will be followed and less unnecessary litigation over whether records should be turned over due to privacy concerns of law enforcement agencies.

4. Argument in Support

According to the California District Attorneys Association:

> The United States Constitution requires prosecutors to provide the defense in criminal cases with exculpatory evidence that is material to either guilt or punishment. (*Brady v. Maryland* (1963) 373 U.S. 83, 87.) Exculpatory evidence includes information the defense may use to impeach the credibility of peace officer witnesses, such as prior misconduct by the officer. This exculpatory information is commonly referred to as "*Brady* material." Of course, a prosecutor cannot disclose *Brady* material of which the prosecutor is unaware. While the overwhelming majority of peace officers' personnel files do not have *Brady* material, a percentage does. SB 1220 will help prosecutors to discover, and disclose, exculpatory evidence such as sustained disciplinary findings of group bias or dishonesty.
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> In recent years, the California Supreme Court has lauded and upheld the voluntary law enforcement practice of notifying prosecutors when an officer's file may contain *Brady* material. (*Association for Los Angeles Deputy Sheriffs v. Superior Court* (2019) 8 Cal.5th 28, 53-55*; People v. Superior Court* (*Johnson*) (2015) 61 Cal.4th 696, 713-714.) However, the court made clear that law enforcement agencies are not required to provide such information. Because no law compels it, some of California's largest agencies do not provide *Brady* notifications to

prosecutors. Without this information, the defense is unable to confront law enforcement witnesses with prior misdeeds that may impact the witnesses' credibility.

SB 1220 would solve this problem by requiring law enforcement agencies to notify prosecutors when a peace officer has potential *Brady* material in his or her personnel file. Under this common sense and balanced legislation, agencies would provide prosecutors the officer's name and badge number. Because certain types of peace officer misconduct records are already subject to disclosure under the Public Records Act (2018 SB 1421, Skinner), counsel could obtain those records merely by requesting them. Otherwise, a judge would review the records and determine whether they should be disclosed to counsel. In addition, officers would have a right to notice when a prosecutor's office places their names on a list of officers with potential *Brady* information in their personnel files. The officers would have the right to request removal if their names were included on the list without justification.

By mandating *Brady* notification from law enforcement agencies to prosecutors, SB 1220 will ensure prosecutors are able to meet their Constitutional disclosure obligations and will improve the criminal justice system.

5. Argument in Opposition

According to the California Association of Highway Patrol:

While the CAHP supports the idea of creating a statewide, uniform appeal or rebuttal process for peace officers who are on the Brady List or being considered for placement on the list, this measure, as amended on April 29th, does not guarantee some type of due process for these peace officers, such as notice prior to being placed on the list and a chance to rebut it.

In addition, we believe that many parts of SB 1220 are not needed. As stated before, the CAHP supports a statewide rebuttal system for officers. However, a full, statewide statutory process is not warranted. We do not have a statutory enactment of *Miranda v. Arizona* codifying the requirement to issue a *Miranda* warning. We do not have a statutory enactment of *Carroll v. United States* codifying a vehicle search exception to the warrant requirement of the Fourth Amendment. Why? Simple, because the law of the land is expressed in the US Supreme Court decisions themselves—statutory enactments on issues resolved by the highest court in the land are unnecessary.

Brady discovery, generally, has been more than adequately addressed by the US Supreme Court in *Brady v. Maryland*, and *Brady* discovery as it pertains to confidential peace officer personnel records or information contained therein, has been more than adequately addressed by the California Supreme Court in *Johnson* and *ALADS*.

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